

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY ALEX DEMETER	:	CIVIL ACTION
	:	
v.	:	
	:	
TODD BUSKIRK, et al.	:	NO. 03-790

MEMORANDUM

Padova, J.

October 20, 2003

Pro se Plaintiff Gregory Alex Demeter brings this action under 42 U.S.C § 1983 against Defendants Todd Buskirk, Scott Hoke, James Smith, and John McGeehan, of all of whom are officials of the Northampton County Prison ("Prison") in Easton, Pennsylvania, for alleged violations of his federal and state constitutional rights while he was a pretrial detainee at the Prison. Defendants filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the matter has been briefed by both parties. For the reasons that follow, the Court grants Defendants' Motion for Summary Judgment in part and denies Defendants' Motion for Summary Judgment in part.

I. RELEVANT BACKGROUND

On May 5, 2001, Plaintiff was incarcerated at the Prison as a pretrial detainee facing prosecution on charges of driving under the influence and receipt of stolen property. (Demeter Dep. at 13-14). He ultimately pled guilty to both counts on December 2, 2001. (Id. at 14). On December 5, 2001, Defendant was released from the Prison. (Id.)

Plaintiff alleges in his Complaint that the Prison law library was closed completely from June 2001 until December 2001, comprising nearly all of his seven-month pretrial detention period, a stretch during which he had several civil cases, as well as his criminal case, pending in state and federal court. (Compl. ¶¶ 3, 6). Plaintiff asserts that he was only permitted access to the prison law library for a total of six hours between May 2001 and December 2001,¹ despite numerous grievances he filed with Defendants. (Demeter Dep. at 28; Compl. ¶ 14). Plaintiff contends that such restricted access severely impaired his ability to pursue his pending pro se civil actions and defend against his pending criminal action,² amounting to a violation of his constitutional right to access the courts.

Specifically, Plaintiff claims that his extremely limited access to the Prison law library over the seven-month pretrial detainment period prevented him from making the following filings in connection with his then-pending criminal trial before the Court of Common Pleas of Northampton County: (1) omnibus pretrial motions to suppress evidence; (2) excessive bail appeal; and (3) motion to be released on nominal bail pursuant to Pennsylvania Rule of

¹ Solely for purposes of their summary judgment motion, Defendants concede that Plaintiff enjoyed a total of only six hours of access to the Prison law library during his pretrial detention from May 2001 until December 2001. (Def.'s Mot. Summ. J. at 3).

² Plaintiff was represented by counsel in connection with his then-pending criminal case. (Demeter Dep. at 33-35).

Criminal Procedure 600 ("Rule 600"). Plaintiff further contends that his lack of sufficient access to the Prison law library during the period in question hindered his efforts to pursue the following pro se civil cases: (1) a civil rights action brought pursuant to 42 U.S.C. § 1983 ("§ 1983") in the United States District Court for the Middle District of Pennsylvania ("Middle District of Pennsylvania"), civil action number 01-582; (2) a civil rights action brought pursuant to § 1983 in the United States District Court for the Eastern District of Pennsylvania ("Eastern District of Pennsylvania"), civil action number 01-2179; (3) a civil rights action brought pursuant to § 1983 in the Eastern District of Pennsylvania, civil action number 01-3720; (4) appeal numbers 01-3720 and 02-1288 in the United States Court of Appeals for the Third Circuit ("Third Circuit"); (5) an appeal before the Supreme Court of Pennsylvania, case number 149 MM 2001; (6) a petition filed pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"); and (7) a habeas corpus petition brought under 42 Pa.C.S.A. § 6503.

Plaintiff also alleges that Defendants opened and read his incoming legal mail outside of his presence, in violation of his constitutional right to freedom of speech, and that Defendants further violated his constitutional rights by intercepting his outgoing legal mail.

II. STANDARD FOR SUMMARY JUDGMENT

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) ("Rule 56"). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary

judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. "[T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id. at 252. "If the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. DISCUSSION

A. Constitutional Right to Access the Courts

It is well-established that inmates have a constitutional right of "meaningful" access to the courts. Bounds v. Smith, 430 U.S. 817, 822 (1977). While the United States Supreme Court has never clarified the constitutional source of the right of access to the courts, the Third Circuit has concluded that such right is grounded in both the First Amendment right to petition and the Due

Process Clause of the Fourteenth Amendment. Bieregu v. Reno, 59 F.3d 1445, 1453-1454 (3d Cir. 1995), overruled sub. nom. on other grounds, Lewis v. Casey, 518 U.S. 343 (1996). This fundamental right "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Bounds, 430 U.S. at 828. To establish a violation of the right of access to courts, the inmate must prove "actual injury," i.e., that "the alleged shortcomings in the library . . . hindered his efforts to pursue a legal claim." Lewis v. Casey, 518 U.S. 343, 351 (1996). The actual injury requirement cannot be satisfied "simply by establishing that [the] prison's law library . . . is subpar in some theoretical sense," as an inmate enjoys "no abstract, free standing right to a law library or legal assistance." Id. Furthermore, the actual injury requirement is satisfied only by a showing that the inadequacies of the library frustrated the inmate's ability to pursue either a civil rights action under 42 U.S.C. § 1983 or a direct appeal from a conviction that resulted in incarceration. Id. at 354.

1. Plaintiff's then-pending criminal case

Plaintiff asserts that his insufficient access to the Prison law library prevented him from making three separate filings in connection with the defense of his then-pending criminal prosecution in the Court of Common Pleas of Northampton County: (1)

omnibus pretrial motions to suppress evidence; (2) excessive bail appeal; and (3) a Rule 600 motion. Plaintiff claims that his inability to make these filings forced him to plead guilty to charges of driving under the influence and receipt of stolen property.

At the threshold, it is questionable whether the requisite "actual injury" can be established where the underlying frustrated claim is neither a civil rights action under § 1983 nor a post-conviction direct or collateral appeal. Indeed, the Supreme Court has taken pains to rigidly circumscribe the universe of claims capable of satisfying the actual injury requirement. See Lewis, 518 U.S. at 354 (observing that "the injury requirement is not satisfied by just any type of frustrated legal claim"); Bounds, 430 U.S. at 825 (clarifying that "[t]he inquiry is whether law libraries . . . are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts")(emphasis added). In contrast to the convicted prisoners involved in Bounds and Smith, however, Plaintiff was an incarcerated pretrial detainee during the period in which the alleged injuries to his then-pending criminal case occurred. Whether Plaintiff's status as a pretrial detainee broadens the scope of actionable claims under the right of access to the courts is unclear, as no court has squarely addressed the issue.

Even if the right of access to the courts does encompass defending against criminal prosecution, the fact that Plaintiff was represented by, and had access to, legal counsel in connection with his criminal case precludes a finding of actual injury based on Plaintiff's restricted access to the Prison law library. As Bounds and Lewis make clear, prisoners do not have an independent constitutional right to law library access; the availability of a law library is merely "one constitutionally accepted method to assure meaningful access to the courts." Bounds, 430 U.S. at 830. The relevant inquiry is whether the prisoner has been given a "reasonably adequate opportunity" to present his claim to the courts. Bounds, 430 U.S. at 825. Numerous courts have therefore dismissed access to court challenges where the inmate was represented by counsel, despite the fact that the inmate lacked access to the prison law library. See, e.g., Martucci v. Johnson, 944 F.2d 291, 295 (6th Cir. 1991) (denying access to court claim because inmate was represented by counsel for the entire length of pretrial detention); Davis v. Milwaukee County, 225 F.Supp.2d 967, 973 (E.D. Wis. 2002) (rejecting access to court claim because inmate had access to a court-appointed attorney).

It is undisputed that Plaintiff was represented by counsel throughout the pendency of his criminal prosecution. Despite allegations in his Complaint to the contrary, Plaintiff has since admitted that his attorney filed a Rule 600 motion on his behalf.

(Demeter Dep. at 38). While omnibus pretrial motions to suppress evidence and an excessive bail appeal were apparently never filed, both failures can be directly attributed to Plaintiff's counsel.³ Plaintiff admitted during his deposition that his counsel drafted pretrial motions to suppress evidence, but never filed such motions. (Demeter Dep. at 35). Furthermore, Plaintiff's Complaint alleges that his loss of the right to file an excessive bail appeal was "due to counsel failure." (Compl. ¶ 8). In sum, any lack of access to the courts suffered by Plaintiff is directly attributable to the shortcomings of his defense counsel, rather than any deficiency in the law library. Accordingly, Defendants' Motion for Summary Judgment is granted with respect to Plaintiff's claim that his restricted access to the Prison law library caused actual injury to his then-pending criminal case in violation of his right of access to the courts.

2. Plaintiff's then-pending civil proceedings

Plaintiff alleges that his constitutional right of access to the courts was violated in a number of his then-pending pro se civil cases.

³Notably, the Pennsylvania Rules of Civil Procedure preclude defendants who are represented by counsel from directly filing their own motions and other papers. See Pa. R. Crim. P. § 576(c) ("In any case in which a defendant is represented by an attorney, if the defendant submits for filing a written motion, notice, or document that has not been signed by the defendant's attorney, the clerk of courts shall not docket or record it, but shall forward it to the defendant's attorney within 10 days of receipt").

Plaintiff brought civil action number 01-582 on April 3, 2001 in the Middle District of Pennsylvania against the Pennsylvania Department of Corrections and three prison officials. In the instant proceeding, Plaintiff alleges that his lack of access to the Prison law library prevented him from filing a successful motion to amend the caption in civil action number 01-582 by removing the Pennsylvania Department of Corrections as a defendant. Plaintiff contends that if he had been able to amend the caption, the individual defendants would not have been able to successfully assert a privity defense. Plaintiff further alleges that his restricted access to the Prison law library prevented him from timely filing a motion for reconsideration of a court order denying his request for a phone conference to address the pending motion to dismiss in civil action number 01-582.

The record before the Court shows that Plaintiff did not suffer any actual injury to his constitutional right of access to the courts. According to the docket of civil action number 01-582, Plaintiff did file a motion to amend the caption on August 20, 2001, (Docket No. 31), but it was deemed withdrawn by the Court on October 9, 2001, because he failed to file a supporting brief. (Docket No. 42). Nevertheless, the docket further reveals that he was granted leave to file an amended Complaint on March 13, 2002, (Docket No. 57), at which point he had the opportunity to effectively amend the caption as he saw fit. Moreover, the docket

shows that while Plaintiff was unable to state his opposition to the motion to dismiss via telephone conference, he submitted two separate briefs in opposition to the motion to dismiss while incarcerated at the Prison. (Docket Nos. 30, 43).

More importantly, the Court's decision to grant Plaintiff leave to file an amended complaint rendered the previously filed motion to dismiss moot. Although the Court ultimately granted a subsequent motion to dismiss by Defendants, that motion was not even filed until May 22, 2002, (see Docket No. 62), well after Plaintiff had been released from the Prison. Plaintiff's lack of library access, therefore, did not substantially hinder his ability to pursue this civil action number 01-582, in violation of his constitutional right to access the courts. Accordingly, Defendants' Motion for Summary Judgment is granted in this respect.

Civil action number 01-2179 was brought in the Eastern District of Pennsylvania against various officials of the Prison. Plaintiff contends that he was unable to meaningfully oppose Defendants' successful summary judgment motion, filed on November 23, 2001, because of his insufficient access to the Prison law library. (Def. Ex. C, Docket No. 32). The docket reveals, however, that Plaintiff filed an opposition brief on December 3, 2001, purportedly in response to Defendant's "motion to dismiss."⁴ (Def.

⁴ The Court presumes that this brief was intended as a response to Defendants' motion for summary judgment, which had been filed ten days earlier, since Defendants never filed a motion to dismiss

Ex. C, Docket No. 39). Even if Plaintiff's limited access to the Prison law library seriously compromised the quality of that submission, he was granted a twenty-day extension to file his opposition to Defendants' summary judgment motion on December 4, 2001, (Def. Ex. C, Docket No. 40), the day before he was released from the Prison. As such, any hindrances on Plaintiff's ability to meaningfully oppose the summary judgment motion in civil action number 01-2179 cannot be reasonably attributed to deficiencies in the Prison law library. Accordingly, Defendants' Motion for Summary Judgment is granted in this respect.

Plaintiff filed civil action 01-3720 in the Eastern District of Pennsylvania on July 25, 2001 against numerous defendants, some of whom are Defendants in the instant proceeding. He alleges that his insufficient access to the Prison law library prevented him from conducting the research necessary to prepare a motion for injunctive relief in civil action number 01-3720 to have urgent dental treatment administered. Plaintiff's argument is undermined, however, by the fact that he filed a separate request for injunctive relief on November 5, 2001, (Def. Ex. C, Docket No. 15), and also included claims for injunctive relief in his amended complaint filed on November 16, 2001. (Def. Ex. C, Docket Nos. 17, 29). While Plaintiff may not have actually filed a motion for injunctive relief specifically concerning his need for dental

in this case.

treatment, his filing of several other claims for injunctive relief while incarcerated at the Prison reveals that he was able to prepare and submit this type of claim. As the Supreme Court has made abundantly clear, the fundamental right of access to the courts does not require that inmates "be able to conduct generalized research, but only that they be able to present their grievances to the courts - a more limited capability that can be produced by a much more limited degree of legal assistance." Lewis, 518 U.S. at 359. Accordingly, Defendants' Motion for Summary Judgment will be granted with respect to Plaintiff's contention that he was deprived of access to the courts in civil action number 01-3720.

Plaintiff filed appeals numbers 01-3882 and 02-1288 in the Third Circuit to challenge orders of this Court denying Plaintiff's motions to proceed in forma pauperis in two civil rights actions brought pursuant to § 1983. Plaintiff contends that his restricted access to the Prison law library prevented him from submitting filings in connection with these appeals, which resulted in both appeals being procedurally terminated without judicial action.

The docket for appeal number 02-1288 reveals that Plaintiff did not file his notice of appeal until January 30, 2002, nearly two months after his release from the Prison. Accordingly, Plaintiff's inability to fully pursue this appeal cannot be attributed to his lack of access to the Prison law library between

May 2001 and December 2001.

The docket for appeal number 01-3882 shows that Plaintiff filed his notice of appeal on October 26, 2001, and that the appeal was procedurally terminated on January 3, 2002. The underlying order of this Court had denied Plaintiff's motion to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(g). Section 1915(g) requires a federal court to deny in forma pauperis status to the prisoner who "on 3 or more prior occasions, while incarcerated or detained in any facility . . . brought an action . . . that was dismissed on the grounds that it is frivolous . . . unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). This Court's order denied Plaintiff's request for in forma pauperis status because the Court had dismissed six of Plaintiff's prior § 1983 actions as frivolous. Plaintiff therefore cannot establish actual injury in this case because his appeals were frivolous.⁵ See Lewis, 518 U.S. at 362 & n.2 (holding that actual injury requirement is not satisfied by a lost frivolous claim). Because Plaintiff's lack of access to the Prison law library did not result in actual injury to his constitutional right

⁵ Despite the frivolousness of Plaintiff's in forma pauperis claims, Plaintiff insists that, had he been given sufficient access to the Prison law library to research state law, he could have avoided the constraints of federal in forma pauperis laws by filing identical claims in state court. Plaintiff's contentions are misplaced, for "the Constitution does not require that prisoners . . . be able to conduct generalized research, but only that they are able to present their grievances to the courts" Lewis, 518 U.S. at 359.

to access the courts in Third Circuit appeal numbers 01-3882 and 02-1288, Defendants' Motion for Summary Judgment is granted in this respect.

Plaintiff brought appeal number 149 MM 2001 in the Supreme Court of Pennsylvania to challenge the rejection by the Pennsylvania Commonwealth Court of a request for mandamus relief based on time-served credit he was allegedly owed from a prior sentence. On or before February 28, 2001, Plaintiff's appeal was dismissed by the Supreme Court of Pennsylvania for failure to perfect. (Plf. Ex., Letter from Pa. Supreme Ct. to Demeter of 2/28/01). On July 17, 2001, Plaintiff submitted an Application for Leave to File an Appeal Nunc Pro Tunc with the Supreme Court of Pennsylvania. (Plf. Ex., Letter from Pa. Supreme Ct. to Demeter of 9/27/01). Appellee, the Pennsylvania Department of Corrections, filed an Application for Leave to File a Motion to Quash, as well as a Motion to Quash, on or about August 31, 2001. (Plf. Ex., Letter from Pa. Dept. of Corrections to Pa. Supreme Ct. of 8/31/01). By letter dated September 12, 2001, Plaintiff advised the Supreme Court of Pennsylvania of his desire to amend his Appeal Nunc Pro Tunc and to file a motion to dismiss Appellee's Motion to Quash. (Plf. Ex., Letter from Demeter to Pa. Supreme Ct. of 9/12/01). The Prothonotary responded to Plaintiff on October 2, 2003, advising him that the pleadings were closed and, therefore, no additional filings would be accepted. (Plf. Ex., Letter from

Johns to Demeter of 10/2/01). On October 9, 2001, the Supreme Court of Pennsylvania denied Plaintiff's Application for Leave to File an Appeal Nunc Pro Tunc.

Plaintiff contends that his lack of access to the Prison law library hindered his ability to pursue his appeal to the Supreme Court of Pennsylvania, as he was prevented from timely filing an amended nunc pro tunc appeal and a motion to dismiss appellee's motion to quash. Appeals nunc pro tunc are designed to remedy "certain extraordinary situations where the state constitutional 'right of appeal was denied.'" Commonwealth v. Hall, 771 A.2d 1232, 1236 (Pa. 2001) (quoting Commonwealth v. Stock, 679 A.2d 760, 764 (Pa. 1996)). In civil cases, an appeal nunc pro tunc is granted only where there was "fraud or a breakdown in the court's operations through a default of its officers." Union Elec. Corp. v. Bd. of Property Assessment, 746 A.2d 581, 584 (Pa. 2000) (quoting Bass v. Commonwealth, 401 A.2d 1133, 1135 (Pa. 1979)). Plaintiff, however, does not attribute his failure to properly perfect his original appeal to the Supreme Court of Pennsylvania to fraud, a breakdown in the court's operations, or any other extraordinary situation. Instead, he alleges that his failure to perfect was merely "due to the belief that case was a moot issue, due to my release from prison." (Plf. Ex., Mot. for Leave to Amend Appeal Nunc Pro Tunc, at 3). Because Plaintiff's appeal nunc pro tunc was plainly frivolous, he has failed to demonstrate the

requisite actual injury to support a claim of denial of his right of access to the courts. Accordingly, Defendants' Motion for Summary Judgment is granted with respect to Pennsylvania Supreme Court appeal number 149 MM 2001.⁶

Plaintiff next contends that his lack of access to the Prison law library prevented him from filing an appeal under the PCRA to challenge his guilty plea to charges of criminal conspiracy and retail theft before the Court of Common Pleas of Lehigh County.⁷ The Court's independent review of the docket of this case reveals

⁶ Plaintiff also asserts that his failure to timely amend his nunc pro tunc appeal and to file a motion to dismiss, which he attributes to insufficient access to the Prison law library, hindered his ability to pursue a civil rights action under § 1983 related to time-credit owed on the same prior sentence. Specifically, Plaintiff alleges that, in civil action number 01-2179, Defendants successfully raised a collateral estoppel defense based on the denial of Plaintiff's request for mandamus relief by the Pennsylvania Commonwealth Court, and the subsequent dismissal of his original appeal to the Supreme Court of Pennsylvania. Indeed, it appears that Plaintiff's decision to file a nunc pro tunc appeal was motivated in part by the collateral estoppel defense raised in civil action number 01-2179. Any prejudice to Plaintiff's § 1983 action in case number 01-2179, however, is fairly attributable to Plaintiff's failure to properly perfect his original appeal to the Supreme Court of Pennsylvania, which was dismissed over two months before Plaintiff was even incarcerated at the Prison. In any event, the constitutional right of access to the courts does not require Defendants to enable inmates "to litigate [grievances] effectively once in court." Lewis, 518 U.S. at 354 (emphasis in original).

⁷ Although Defendants argue that Plaintiff was represented by counsel, who actually filed a PCRA petition on his behalf, the record reveals that this representation was in connection with Plaintiff's PCRA appeal of his guilty plea in Northampton County Court of Common Pleas for driving under the influence and receipt of stolen property. See Def. Ex. B (Demeter Dep., at 45-46).

that Plaintiff pled guilty to the criminal conspiracy and retail theft charges on May 30, 2001, and was sentenced in connection with this offense on the same day.

Under the Pennsylvania PCRA statute, any PCRA petition "must be filed within one year of the date the judgment becomes final." 42 Pa. Cons. Stat. Ann. § 9545(b)(1). "A judgment becomes final . . . at the expiration of the time for seeking the [direct] review." Id. § 9545(b)(3). Under Pennsylvania Rule of Appellate Procedure 903(a), a party must file a notice of direct appeal within 30 days after entry of the order from which the appeal is taken. Assuming that Plaintiff did not file a direct appeal, the earliest date on which Plaintiff's judgment before the Lehigh Court of Common Pleas could have become final was June 29, 2001. He therefore had until at least June 29, 2002 to file a PCRA petition in connection with this judgment. Plaintiff was released from the Prison on December 5, 2001, approximately eight months prior to the earliest possible expiration of his time for filing a PCRA petition. Given that the record before the Court contains no indication that Plaintiff even contemplated⁸ pursuing a PCRA appeal while in the Prison, a reasonable jury could not find that Plaintiff's claim was "so stymied by inadequacies of the law library that he was unable to even file a [petition]." Lewis, 518

⁸ Notably, the constitutional right of access to the courts does not require the State to "enable the prisoner to discover grievances" Lewis, 518 U.S. at 354 (emphasis in original).

U.S. at 351. Accordingly, Defendants' Motion for Summary Judgment is granted with respect to Plaintiff's claim that he was prevented from filing a PCRA appeal. Plaintiff further alleges that his restricted access to the Prison law library precluded him from filing a state habeas corpus petition challenging the Prison living conditions. Habeas corpus is an extraordinary remedy which may only be invoked when remedies in the ordinary course have been exhausted or are not available. Commonwealth v. Johnson, 732 A.2d 639, 644 (Pa. Super. Ct. 1999). Thus, "habeas corpus should not be entertained . . . merely to correct prison conditions that can be remedied through an appeal to prison authorities or to an administrative agency." Commonwealth ex. rel. Bryant v. Hendrick, 280 A.2d 110, 113 (Pa. 1971). Because "it is not the function of the courts to superintend the treatment and discipline of prisoners in penal institutions," id., the "writ may be used only to extricate a petitioner from illegal confinement or to secure relief from conditions of confinement that constitute cruel and unusual punishment." Commonwealth ex. rel. Fortune v. Dragovich, 792 A.2d 1257, 1259 (Pa. Super. Ct. 2002), appeal denied, 803 A.2d 732 (Pa. 2002).

The record before the Court does not establish that Plaintiff exhausted his appeals to the Prison authorities concerning the living conditions of the Prison. The submissions reveal only that, per Plaintiff's request, the convener of the Northampton County

Prison Society met with Defendant Buskirk to discuss Plaintiff's concerns about his food being cold. Moreover, even assuming that Plaintiff fully and properly exhausted his remedies, he has failed to submit any concrete evidence demonstrating that the prison living conditions to which he was personally subjected rose to the level of cruel and unusual punishment. Indeed, the only evidence that Plaintiff offers in support of his claim is a newspaper article reporting allegations by inmates that the Prison living conditions were poor.

As the right of access to the courts only embraces nonfrivolous claims that have been frustrated by lack of law library access, Lewis, 518 U.S. at 353, Defendants' motion is granted with respect to Plaintiff's claim that his lack of law library access prevented him from filing a state habeas corpus petition.⁹

B. Constitutional Right to Freedom of Speech

The Third Circuit has concluded that an inmate's freedom of speech rights under the First and Fourteenth Amendments are infringed by a pattern and practice of opening the inmate's

⁹ In an affidavit accompanying his brief in opposition to Defendants' motion, Plaintiff baldly sets forth, for the first time, a number of other lawsuits that he was precluded from filing because of insufficient access to the Prison law library. (Demmeter Aff. ¶¶ 22, 30, 33, 36). Such conclusory allegations, however, are insufficient to raise genuine issues of material fact.

incoming legal mail outside his presence, as "[s]uch a practice chills protected expression and may inhibit the inmate's ability to speak, protest, and complain openly, directly, and without reservation with the court." Bieregu, 59 F.3d at 1452.

Plaintiff alleges that Defendants violated his right to free speech by opening, outside of his presence, several incoming letters addressed to him and clearly marked as legal mail. To support his contention, Plaintiff submits twelve envelopes, all of which are clearly labeled as legal mail, that he alleges were opened outside of his presence. (Plf. Ex., Legal Mail Ltrs). Plaintiff further submits a grievance he filed with the Prison on October 23, 2001, which alleges that a legal package from his attorney was opened when he received it, and that this was the fifth such occurrence. (Plf. Ex., Grievance Slip of 10/23/01).

Defendants have made no submissions specifically addressing the issue of whether Plaintiff's incoming legal mail was read outside of his presence. Accordingly, Defendants' Motion for Summary Judgment is denied with respect to this claim.

C. Plaintiff's Remaining Claims

1. Interception of plaintiff's outgoing mail

Plaintiff alleges that Defendants violated his constitutional rights by intercepting his outgoing legal mail. In support of this contention, Plaintiff merely notes that he did not receive responses to several letters that he sent out to various legal

agencies while incarcerated at the Prison. No reasonable jury could return a verdict for Plaintiff based solely on such personal speculation. Accordingly, Defendants' motion is granted with respect to Plaintiff's claim that his outgoing legal mail was intercepted by Defendants.

2. State law claims

Plaintiff asserts that his lack of access to the Prison law library, as well as Defendants' interception and opening of his legal mail outside of his presence, also violated his rights under the Pennsylvania Constitution. Federal courts have the power to exercise pendent jurisdiction over state law claims that are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367 (a). State claims are "so related" to federal claims when they "derive from a common nucleus of operative fact." United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). Pendent jurisdiction, however, "is a doctrine of discretion, not of plaintiff's right." Id. at 726. Indeed, considerations of comity and justice counsel against exercise of pendent jurisdiction over a state claim where clear state law precedent is lacking. Id.

This Court's research of Pennsylvania law reveals that the Pennsylvania courts have never defined the contours of any right of access to the courts, or of any other right applicable to

Plaintiff's claims, under the Pennsylvania Constitution. As a matter of comity and to promote justice between the parties, therefore, the Court declines to exercise pendent jurisdiction over Plaintiff's state law claims. Accordingly, Plaintiff's state law claims are dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is granted, except with respect to Plaintiff's claim that Defendants violated his freedom of speech rights under the First and Fourteenth Amendments by reading his incoming legal mail outside of his presence. An appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY ALEX DEMETER	:	CIVIL ACTION
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ORDER

AND NOW, this 20th day of October, 2003, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 20), the papers filed in support thereof, and Plaintiff's response thereto, **IT IS HEREBY ORDERED** as follows:

- 1) Defendants' Motion for Summary Judgment is **GRANTED** with respect to Plaintiff's claims based on his constitutional right of access to the courts, and these claims are **DISMISSED**.
- 2) Defendants' Motion for Summary Judgment is **GRANTED** with respect to Plaintiff's claim that Defendants intercepted his outgoing legal mail, and this claim is **DISMISSED**.
- 3) Defendants' Motion for Summary Judgment is **DENIED** with respect to Plaintiff's claim that Defendants

violated his freedom of speech rights by reading
his incoming legal mail outside of his presence.

- 4) Plaintiffs' state law claims are **DISMISSED**.

BY THE COURT:

John R. Padova, J.